No. 138.

No. 138 of October Term, 1900.

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JAMES H. McKENNEY,
Clerk.

M. of Davies for Appellees.

IN THE

Supreme Court of the United States.

Filed Dec. 5, 1900.

IN EQUITY.

JAMES HOLLY,

Petitioner and Appellant,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Record No. 17,523.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR APPELLEES.

JULIEN T. DAVIES,
HERBERT BARRY,
Of Counsel for Appellees.

In the Supreme Court of the United States.

JAMES HOLLY,
Petitioner and Appellant,

against

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA,
Defendant and Respondent,

AND E. WALTER ROBERTS.

BRIEF FOR THE RESPONDENT.

Statement of Facts.

THE COMPLAINANT'S CLAIM.

Holly, the complainant, claims to have traced into the hands of the defendant Society and seeks to recover from it certain moneys that he had paid over to one Henry C. Thompson. These moneys Holly now claims were held by Thompson in a fiduciary capacity, and that they were by him embezzled and paid to the defendant Society in breach of his trust.

THE DEFENSE TO THE ACTION.

This is threefold—apart from failure of proof:

1. That the relation between Thompson and Holly was that of debtor and creditor, and the complainant has failed

to show that any money paid by him to Thompson was impressed with a trust in favor of the complainant.

2. That the moneys received by the defendant Society from Thompson were received for value and without notice of Holly's claim.

3. That the moneys received by the defendant Society were applied and disbursed by it for the specific purposes for which they were received before any notice was received of Holly's claim.

Henry C. Thompson, the man whose misconduct led up to the present suit, is not made a party to the action. The defendant Society has no interest in common with Thompson, and it has nothing to say in excuse, extenuation or palliation of the wrong that Thompson did to Mr. Holly.. It does maintain, however, that the consequences of this wrong should not be visited upon the defendant Society, which is in no way responsible for the misconduct or its results.

THE FACTS AS TO THE MONEY PAID BY HOLLY TO THOMPSON.

On May 14, 1890, the complainant Holly, a resident of Philadelphia, purchased at auction a piece of real estate in that city, the price being $12,300 (p. 66). He paid $200 to the auctioneer upon account and engaged Henry C. Thompson, above referred to, as the lawyer to examine the title and draw the deed (p. 35). The property was bought from the representatives of the estate of Joshua Morgan, deceased (p. 66).

Mr. Holly called upon Mr. Thompson two or three times to see what progress was being made in closing the title.

On the earlier occasions Mr. Thompson told him that certain papers to be signed by some of the grantors had not been executed (p. 35); but with reference to the last occasion, which was on June 19, 1890, Mr. Holly testifies (p. 36):

> "The last time I went to him he told me that the papers were ready; that everything would be right, and that he would have everything settled in a few days: for me to give him my check; I gave him my check; he wrote me a receipt and I left him."

This check was for $12,000, and that it could not be properly designated a trust fund appears from Mr. Holly's further testimony (p. 69):

> "Q. How did you expect Mr. Thompson to pay $12,100, which was the balance then due, out of the $12,000, which you paid him? A. I did not suppose that this was settling the thing. I supposed this was paying him what he asked me, and I would pay the balance afterwards when we were settling the account. That is just what he asked me for, and I gave him a check and he filled it up for that amount.

By the testimony of the Custodian of the Records of the Orphans' Court of Philadelphia County, it appears that on June 12, 1890, a petition was filed for confirmation of the sale by the representatives of the Estate of Joshua Morgan, deceased, to James Holly, and that the decree entered thereon was not made until July 12, 1890 (p. 75). Therefore, the parties were not in a position to close the sale at any time prior to July 12, 1890.

This is important. On June 19, 1890, Holly supplied Thompson with funds in order that the latter might be able to pay the purchase price for some property when the seller should be in a position to deliver good title. Holly admits that Thompson told him that the parties

were not, at that time, ready to close, but would be "in a few days" (p. 36). The moneys were not the exact amount required, nor even sufficient to make up that amount. It would be necessary for Thompson to put his hand into his own pocket to complete the amount. In the interim Thompson intended and was expected to deposit the money in his own bank account—not to open a separate account—and there was obviously no intention nor anticipation on the part of either Holly or Thompson that this specific money should be applied to the purchase.

It must be also borne in mind that Holly had known Thompson for twelve or fifteen years (p. 34); had previously employed him on two or more occasions in a professional capacity (p. 35); and on one of these occasions the mode of conducting the transaction was very similar to that in the present instance, viz: Holly supplied Thompson with a certain amount of funds, and Thompson with his own money made the necessary payments, the transaction actually resulting in Mr. Thompson paying out more money than he had been supplied with (p. 110). "He kept no special account for trust moneys. They all went into his personal account" (p. 47).

It is also an important circumstance that at the time of this transaction Thompson was a prominent member of the Philadelphia Bar (p. 39). He occupied an important and responsible position in the Real Estate Title Insurance and Trust Company of Philadelphia (p. 76), was a stockholder of that Company (pp. 39, 80, 86), and was reputed to be a man of considerable means (pp. 53, 72, 79, 86). In point of fact, Thompson's bank account shows

that subsequent to the transactions here in question he deposited upwards of $10,000 in the same bank account with which Mr. Holly's check was placed (p. 109), and more than $1,000 in a personal account with another bank (p. 47). He was also possessed of real estate in New Jersey, upon which he subsequently made a mortgage of $15,000 (p. 78). He appears to have been assessed upon real estate in Philadelphia, at all events up to shortly prior to these transactions (p. 53), and he had other property, the amount of which was not accurately determined. His son testified: "The mental condition of Mr. Thompson has been such that I have been unable to obtain any information from him" (p. 72).

Had it not been for the discovery by other officers of the Real Estate Title Insurance and Trust Company of certain improper dealings on Thompson's part, and his consequent dismissal from that Company, it is probable that the property which Mr. Holly bought would have been paid for and the loss consequent upon Mr. Thompson's various misconducts would have fallen later upon other confiding clients.

In point of fact, Mr. Thompson appears to have absconded two days before the decree was procured ratifying the sale by the Estate of Joshua Morgan to James Holly (p. 42).

THE INDEBTEDNESS OF THOMPSON TO THE DEFENDANT SOCIETY.

The Right Reverend James Saul, of Philadelphia, died November 16th, 1887; by his Will and Codicils he gave his entire estate to the defendant Society (pp. 54 to 56 inclusive), and appointed as his executors Henry C. Thomp-

son, the lawyer above mentioned, and the Rev. Benjamin Watson, D.D.

It appears that the value of the estate as inventoried was $17,268.03 (p. 179), but there is no competent evidence as to the nature of the property constituting the estate at that time. The memorandum books of Thompson, offered in evidence by the complainant, were incompetent as hearsay, being the unsworn statements of a witness not called, and their unreliabillty being further shown by the fact that the entries were absolutely inconsistent with those of the sworn account passed and approved by the Judge of the Orphans' Court (compare pages 104 and 105, and 179 and 180). Whatever the original form of the assets, it is conclusively established that on November 4th, 1889, the executors filed an account in which they charged themselves with $17,824.92, and claimed credits for $2,025.22, leaving a balance of $15,803.70. On November 5th, 1889, the account was confirmed, and the adjudication of the Court contained the following:

> "Vouchers were produced for the credits claimed in the annexed account, and the distributive balance was shown to be..... $15,803.70
>
> | | | |
> |---|---|---|
> | Less pd. filing and advertising.. | $23.50 | |
> | " " Dr. Robert C. Moon.. | 52.00 | |
> | " " Clerk's costs..... | 15.00 | 90.50 |
> | | | $15,713.20 |
> | Less collateral inheritance tax to be paid to the Register..... | | 785.66 |
> | | | $14,927.54 |
>
> which is awarded to the Domestic and Foreign Missionary Society of the P. E. Church in the United States of North America."

The entire management of the estate of Dr. Saul had been left in the hands of Mr. Thompson, and his dealings with it were unknown either to his co-executor or to the Missionary Society. The Missionary Society made enquiries from time to time as to when they might expect payment of the legacy, but Thompson, being a man of excellent reputation and enjoying the confidence of the community in which he lived, no suspicion was aroused by the delay, particularly since such delays were more usual than otherwise in the experience of the Society (p. 162). In the Spring of 1890 the Society became more urgent (pp. 29–32), and, after considerable correspondence, the co-executor, Dr. Watson, became quite peremptory in his tone to Mr. Thompson. Both Dr. Watson and the Society were under the erroneous impression that the estate consisted largely of securities which had not been converted into money (p. 60), and on June 18th, 1890, Mr. Thompson agreed to exhibit to Dr. Watson such securities on the following day (p. 61). On the following day, however, Thompson wrote that he was going to New York to make settlement of the Missionary Society (p. 58), and on that day he did in fact go to New York and deliver to the defendant Society his check for $15,577.54, stating that it was in part payment of the same legacy.

THE FACTS AS TO THE PAYMENT MADE TO THE DEFENDANT SOCIETY BY THOMPSON.

On June 19, 1890, the executor, Henry C. Thompson, appeared at the office of the defendant Society in New York City, and what took place is described by the witness E. WALTER ROBERTS as follows (p. 158):

"Mr. Thompson simply said, 'I am Mr. Thompson (mentioning his initials). Here is so much on account of the Saul Legacy,' and he made a check with this memorandum and asked me for a receipt on account. I left Mr. Thompson and went into the Secretary's room, and we spoke together. I made out a receipt and handed it to Mr. Thompson, and he went out. * * * The paper was as follows, when handed to me by him:

ESTATE OF JAMES SAUL.

Balance as per accounts filed	$14,927.54
Dividend received since not included in account	650.00
	$15,577.54"

The testimony of Dr. JOSHUA KIMBER is similar in effect (p. 151).

The check was as follows (p. 104):

"$15,577.54. PHILADELPHIA, June 19, 1890.

THE UNION TRUST COMPANY,
Nos. 715, 717, 719 Chestnut Street.

Pay to the order of The Domestic and Foreign Miss. Soc. of the P. E. Church,
Fifteen thousand five hundred seventy-seven 54/100 Dollars.
No. 623. H. C. THOMPSON."

The receipt was as follows (p. 58):

"NEW YORK, June 19, 1890.

Received from Executors Estate of James Saul late of Philadelphia, Pennsylvania, Fifteen thousand five hundred twenty-seven 54/100 Dollars ($15,527.54).

GEORGE BLISS, Treasurer,
per E. WALTER ROBERTS,
Ass't. Treasurer."

The entire innocence with which the Society received this payment is more fully discussed in a subsequent part of this brief.

THE APPLICATION AND EXPENDITURE BY THE SOCIETY OF THE MONEYS RECEIVED FROM THOMPSON.

The legacy from Dr. Saul to the Missionary Society was upon the following terms:

> "Conditioned that the amount thus bequeathed shall be appropriated by said Society in equal proportions of one-third to domestic missions, one-third to foreign missions, and one-third to the benefit of the colored people in the Southern or formerly Slave States, for the support of schools and missions" (p. 54).

Upon receipt of this check from Thompson, the Missionary Society deposited it in their general bank account, where it was collected, and the proceeds were applied in the specific manner designated by Bishop Saul (p. 153). It had all been so expended prior to the receipt of any notice of Holly's claim.

Such notice was first received through a letter from Holly's counsel mailed from Philadelphia on July 17th, 1890 (p. 96), and presumably received on the following day. Thompson's check was deposited on June 20th, and at the opening of business on that day the defendant Society's balance with the bank was $43,569.83 (p. 116). During the period from June 19th, 1890, to July 18th, 1890, the moneys withdrawn by the Society from its account aggregated $88,589.74 (pp. 116–122), being far more than the aggregate of Thompson's check and the balance on hand when it was deposited.

It was also elaborately shown that the amounts expended during this period for the specific purposes designated by Bishop Saul were in each instance in excess of the one-third of the amount received by the Society from

Thompson (Exhibits B, C, D and E, p. 147, and the testimony in connection therewith).

The Society had, therefore, received the money for certain specific purposes, and had applied it to and expended it upon those purposes before receiving any notice of Holly's claim.

FIRST POINT.

The relation between Thompson and Holly was that of debtor and creditor, and the complainant has failed to show that the moneys paid by him to Thompson were impressed with any trust.

It sufficiently appears from the evidence that when the $12,000 check was delivered by Holly to Thompson it was not given with any idea that the money would be deposited in a separate account or otherwise set apart as a trust fund.

Holly and Thompson were not dealing at arm's length; Holly had entire trust and confidence in Thompson (p. 39), and handed over to him the money to be deposited and handled as Thompson should see fit. We do not by any means accede to the unsubstantiated statement to the contrary appearing at page 34 of the appellant's brief.

Although the form of the receipt given by Thompson might create a *prima facie* presumption that the money was to be held as a trust, yet the other facts tend to rebut this presumption. It has been frequently held that the

receipt by an agent of funds that would ordinarily create a relationship of trust will not do so if the parties intend the contrary.

The evidence shows that the transaction between Holly and Thompson was at the time considered by them both as creating a relation of debtor and creditor; and when Holly first learned that Thompson had absconded he naturally proceeded to assert his rights *as a creditor*.

On July 17th, 1890, Holly instituted an action *ex contractu* against Thompson and procured the issuance of an attachment (p. 127). By this action Holly unqualifiedly asserted his claim *as a debt* due from Thompson. A year later, on July 15th, 1891, Holly reiterated this claim and assertion in the declaration filed at that time in the cause (pp. 131–3).

In April, 1894, this attachment suit, being no longer useful to the complainant, was discontinued (see record, pp. 126–137).

We respectfully submit, however, that the complainant, having elected to sue Thompson for the $12,000 as a debt, has conclusively established the facts as to the character of the relationship and is estopped from maintaining this suit against the defendant Missionary Society, which is wholly inconsistent with such facts.

It is frequently the case that upon a given statement of facts a person has an election to institute an action, either *ex contractu* or *ex delicto*, but he cannot concurrently maintain both, even though they be against different defendants.

In this case the complainant is suing the defendant Missionary Society on the theory that it has knowingly

received funds stolen from him. Prior, however, to the institution of this suit the complainant had brought suit against Thompson in the Court of Common Pleas of Philadelphia to recover this same amount as a debt.

It cannot be claimed by the complainant that this election was made without knowledge of all the facts, and that he should not be prejudiced thereby, for not only was it brought, but a year after its institution, and after the bringing of the suit at bar, he filed the declaration in his action in order to keep his action alive. This was done with full knowledge that this action was inconsistent with the further prosecution of this suit, for he afterwards moved this Court for leave to prosecute his attachment suit at Philadelphia without prejudice to this action. This application was denied (p. 97). He then endeavored to escape from the consequences of his election by discontinuing his attachment suit in Philadelphia. In his affidavit to obtain a discontinuance of the Philadelphia action, the complainant swears, "that this deponent is advised by his counsel that the further prosecution of the present attachment proceedings in Pennsylvania is likely to prejudice the prosecution in his claim to recover these moneys from the parties who hold the same in the State of New York" (p. 137). It is thus evident that the complainant was acting all along with full knowledge of his rights, but was making a strenuous endeavour to pursue inconsistent remedies at the same time.

However much this method of proceeding may have appealed to the complainant, it is not regarded with favour by the courts. In *Lloyd* vs. *Brewster*, *4th Paige, Chan., 537*, it was held that the vendor of certain goods, who had

brought suit against the vendee for the purchase money, could not afterwards follow the goods or the proceeds thereof into the hands of a third person on the ground of fraud.

In *Morris* vs. *Rexford*, *18 N. Y., 552*, is the exact converse of the above case; the vendor of goods having replevied the goods from the vendee, was held to be barred from bringing a subsequent action for the purchase money.

The Court there says:

> "These proceedings on the part of the plaintiff amounted plainly to an election between inconsistent remedies, and if the right of election existed, the effect was to confine him to the remedy which he then preferred and adopted, and the vendor of goods, on a sale and delivery upon cash terms, if he fails to get payment, may consider the delivery absolute and rely on the responsibility of the vendee, or he may disaffirm and reclaim his property; but he cannot do both of these things. The remedies are not concurrent, and the choice between them once being made, the right to follow other is forever gone. The law tolerates no such absurdity as the seizure of the goods by a person claiming that he has never sold them, and an action by the same person founded on the sale and delivery of the same goods for the recovery of the price. In peculiar circumstances the party may take either one of these courses, but having rightfully made his choice the right to follow the other is extinct and gone."

In *Rodermund* against *Clark*, 46 N. Y., 354, it was held that where one of two joint owners of a sloop sold the entire sloop to a third person without the consent of his co-owner, that co-owner could not, after declining to recognize the sale and retaining possession of the vessel,

bring an action for conversion against his former co-owner.

The Court says:

> "If he actually insisted on keeping the possession of the vessel and refusing to recognize the sale by the defendant, he could not sue the defendant for the conversion. There does not seem to be any doubt that he did so insist. * * * Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. If the remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. (Morris *vs.* Rexford, 18 N. Y., 152.) Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

In *Moller* vs. *Tusker*, 87 N. Y., 166, the Court says:

> "The plaintiffs, upon discovery of the fraud, had a choice of remedies. An action against Valk Brothers for the price according to the terms of sale or replevin of the property, upon the ground that, by reason of the fraud, the contract of sale was void. * * * The plaintiffs manifested their election by bringing this action. After that, the other way of redress was not open to them, for, according to Comyn (Dig. Elect., C. 2), if a man once determines his election, it shall be determined forever, hence they could never successfully assert a claim against the purchaser after the the contract for the election to disaffirm it had been manifested, and to revoke it was not in their power."

In *Fowler* vs. *The Bowery Savings Bank*, 113 N. Y., 450, the plaintiff was entitled to a certain deposit in the defendant Savings Bank. The Savings Bank had, without authority of the plaintiff, paid over the deposit to a third person. The plaintiff having brought an action against the third person, it was held by the Court of

Appeals that he was estopped from bringing an action against the Savings Bank.

The Court says:

> "But if the trustee is bound to pay any money to a beneficiary as a debt due from him to the beneficiary, then if he makes payment to another person, he has not paid the debt, and the money paid is not in fact the property of the beneficiary. In such case the beneficiary may know of the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person receiving the money as his debtor, but he cannot do both. There is in such a case a breach of trust or not, as he may elect, and his election once effectually made is conclusive forever (Comyn, Dig. Elect. C. 2.) If one wrongfully takes and sells personal property not belonging to him the owner has the election to sue him for the proceeds as money had and received to and for his use, and thus ratify the sale, or he may pursue the property and recover it or its value, but he cannot do both and is bound by his election."

It will be noticed from the foregoing opinions that when an election is once made, any act sufficient to show such an election is sufficient to make it conclusive and binding upon the person making the election, as in *Rodermund* vs. *Clark* (*supra*):

> "Any decisive act of a party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

SECOND POINT.

The defendant Society received Thompson's check for $15,577.54 and the proceeds therefrom for value and without notice of the complainant's claim.

SUBDIVISION I.

Payment of an existing indebtedness constitutes a sufficient consideration to support a transfer of negotiable paper and a *a fortiori* a payment.

This proposition is not seriously questioned by the appellant's counsel. His brief suggests limitations and restrictions, but in point of fact the rule is unequivocal and unquestionable.

In *Mayer* vs. *Heidelbach*, 123 N. Y., 332, the Court holds:

> "That the actual payment and absolute discharge of an antecedent debt is a valuable consideration for the transfer of commercial paper and cuts off prior equities" (p. 339);

and the Court, applying this doctrine to the facts in that case, further says:

> "Where the depositor in a bank, having sufficient funds standing to his credit, tenders his check to that bank in payment for negotiable paper which it has for sale, and the bank accepts the check and charges it against the deposit, and files the check as its voucher and delivers over the paper purchased, the holder of that paper is a holder for value, because the antecedent debt is *pro tanto* actually and in fact extinguished."

The Courts of Pennsylvania hold the same doctrine.

Stedman *vs.* Carstairs, 97 Pa. St., 234.

The Federal Courts have gone still further.

In the leading case of *Swift* vs. *Tyson*, 16 Pet., 1, Mr. Justice Story first says, after reviewing the subject, that the English decisions correctly enunciate the rule.

> "They directly establish that a *bona fide* holder taking a negotiable note in payment for or as security for a pre-existing debt is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

And he further says:

> "We have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments."

See also

Railroad Co. *vs.* Nat. Bank, 102 U. S., 14.

SUBDIVISION II.

Thompson was in fact indebted to the defendant Society.

The brief of the learned counsel for the appellant proceeds entirely upon the assumption that no such indebtedness existed. This is a misapprehension of the facts or the law or of both.

Thompson and Dr. Watson, as executors of the will of James Saul, had filed their accounts on September 26th, 1889, in the Orphans' Court of Philadelphia, showing a balance due to the defendant Missionary Society of $14,927.54 (p. 179). This account was confirmed absolutely on November 23d, 1889 (p. 180), and the executors then became jointly and severally liable to the defendant Missionary Society for the entire amount.

The complainant himself went to some trouble to prove that the payment could have been enforced in the Orphans'

Court by an attachment for contempt (p. 72), but this is not the only remedy.

By the filing of the executor's accounts and their confirmation, they became personally liable for the legacy to the defendant Missionary Society, and an action at law could be maintained against them, or either of them, individually as well as in their representative capacity.

Wilson vs. *Wilson*, 3 Binney, 557, is the leading case on this subject. This was an action for money had and received. The plaintiff was the widow and a legatee of one John Wilson, deceased, and the defendant was his executor.

The accounts of the executor had been filed and settled in the Register's office, and thereby a balance of personal estate was found to remain in the hands of the executor after payment of all debts and legacies. The executor claimed this residuum, and this action was brought by the plaintiff to recover her distributive share of it. Judgment was rendered for the plaintiff upon the verdict of a jury, and upon appeal the defendant argued two points, of which one was:

> "That an action for money had and received would not lie against the defendent in his own right, but that it should have been a special action on the case against him as executor."

The Supreme Court, in affirming the judgment, said (p. 559):

> "The plaintiff does not claim by virtue of any demand which she ever had against the *testator;* there is no occasion, therefore, that her judgment should be against the goods of the testator. Although the personal estate came originally to the hands of the defendant *as executor*, yet the money which remains

after the payment of debts, &c., may not improperly be considered as received by him for the use of those persons to whom by law it belongs. Their claim against him is *in his own right*, for withholding the money which he unjustly detains. I am of opinion that the form of action is proper."

This case is cited as authority upon this proposition in

Griffith *vs.* Chew, 8 Sergt. & R., 17, at 32.

Bixler *vs.* Kunkle, 17 Sergt. & R., 298, at 310.

Morrow *vs.* Breuizer, 2 Rawle, 185, at 192.

Foulk *vs.* Brown, 2 Watts, 209, at 213.

Geddes *vs.* Irvine, 5 Pa. St., 508, at 511.

Richardson *vs.* Richardson, 9 Pa. St., 528, at 431.

Pringle *vs.* Pringle 130 Pa. St., 565, at 569.

In *Foulk* vs. *Brown*, 2 Watts, 209 (*supra*), the Court said (at p. 213):

"In *Morrow* vs. *Breuizer*, 2 Rawle, 185, it was decided that *assumpsit* for money had and received would lie against an executor personally for the plaintiff's share of the residuary bequest of personal estate and proceeds of real estate, in conformity with *Wilson* vs. *Wilson*, 3 Binn, 55, in which it was held that assumpsit for money had and received lies against an executor in his individual capacity for a share of personal estate undisposed of by will."

See also, Solliday *vs.* Bissey, 12 Pa. St., 347, at 350.

SUBDIVISION III.

The Missionary Society received the check without notice of the source from which it came.

It is a trite saying that money has no earmark, and that no one is put upon inquiry as to the source from which his

debtor obtains the money with which he pays him. Complainant's bill charged the Society with notice of Thompson's fraud upon him, but except this charge the case is barren of any allegation of such notice, or of any facts which should have put the defendant upon inquiry. The answer of the defendant denies on oath any knowledge or notice, nor were there any circumstances sufficient to put the defendant Missionary Society upon inquiry.

The defendant ROBERTS testified (p. 164):

> "Q. Prior to the time that you received this notice from the plaintiff, Mr. Holly, did you have any knowledge that Thompson had disposed of the property of Dr. Saul's estate improperly?
>
> A. No.
>
> Q. And did you know before that time that Thompson was insolvent?
>
> A. No.
>
> Q. When you received that money from Thompson in June, 1890, did you believe that he was an honest and solvent man?
>
> A. Yes."

Thompson was a man of good standing in the community, who was thought to be an honest man, a reputable lawyer and of undoubted solvency at the time he paid over the money to the defendant Society. His colleagues, the officers of the Real Estate Insurance Company, testified that he was the legal adviser of that company up to the latter part of June or beginning of July, 1890, when they had discovered some irregularities in his proceedings, and they testified that they had no suspicions of his solvency, and had supposed that he was in comfortable circumstances financially up to the time of their discovery (pp. 75–87).

These were the complainant's own witnesses. He him-

self had known Thompson for eleven or twelve years and employed him in prior transactions, and was of opinion that he was honest and solvent. He testified that he had no suspicions of his financial condition; "if I had," he testified, "I wouldn't have given him the check, of course" (p. 39).

Thompson's son, who was called as a witness by the complainant, testified that he had no suspicion of his father's insolvency up to the time of his attempted suicide (p. 71). Another of complainant's witnesses, Dr. Watson, the co-executor of the Saul Estate, testified that at the time Thompson paid the money to the defendant Missionary Society, he had no knowledge that Thompson was paying it with any one else's money, and that prior to that time his character had stood "absolutely well in the community" (p. 60).

If these people, who all lived in the same community with Thompson and were his business associates and relatives, had such a high opinion of his honesty and of his solvency, it certainly cannot be expected that the officers of the defendant Missionary Society here in New York should be expected to be suspicious of his reputation and solvency, and employ a detective agency to ascertain the source from which he derived the money to pay his debts to them.

Nor could it be held that the lapse of time was sufficient to put the Society upon inquiry. His co-executor, Dr. Watson, wrote from time to time that the matter was all right and would be shortly paid, and considering the excellent reputations of the two executors, there was no reason why the defendant Missionary Society should

harass them by any legal proceeding to compel an early payment of the legacy. The defendant, Roberts, the assistant treasurer of the defendant Missionary Society, testified that the defendant Missionary Society received many legacies each year. That of these legacies not all are paid promptly, but that he has frequent occasion to request their payment from executors before the Society receives them. That in fact the greater number of the legacies are paid after delay, but the Society has ultimately, in almost every case, received them (p. 162). Upon the facts it is evident that as to the embezzlement of the assets of the Saul Estate, there was no notice, actual or constructive. It is equally clear that there was no notice of the misapplication of the complainant's money.

Even if the defendants had made every inquiry within their power, they could not have found out any facts which would have informed them as to the source from which Thompson obtained these funds. If they had applied at the trust company upon which the check was drawn, they would have been informed that the trust company could not give any one information concerning their depositors' accounts. Their only other resource would have been to apply to Thompson, and they could do nothing else than rely on his answers as to whence he obtained the money. He might have declined to answer at all, and it is certainly improbable that he would have informed them that he had been guilty of a second act of embezzlement, if, indeed, he had been. From the facts stated in the preceding paragraph, it is evident that the most careful inquiry among Thompson's relatives and busi-

ness associates would have brought out nothing except that Thompson was an honest man of undoubted solvency.

As a matter of fact the evidence clearly shows that the defendant had no knowledge of the embezzlement of the funds of the Saul Estate by Thompson, nor any knowledge which could fairly be said to put any reasonable man upon inquiry, had such inquiry been necessary. But although the facts so distinctly refute the plaintiff's charge, it would not be necessary for the defendant to rely upon this proof.

The complainant strenuously claimed in the Court below that the defendants were chargeable with notice of Thompson's embezzlement of the Saul Estate, and as a corollary, that they are also chargeable with notice that the proceeds of Thompson's check to the Society were fraudulently diverted by him from their proper object. The claim is unsupported in fact and is futile even if the facts could be established. The merits of the case are not at all affected by the question whether or not the defendants had actual notice or were chargeable with constructive notice that Thompson had embezzled the assets of the Saul Estate. Even assuming there had been actual knowledge of such fact, what would have been the duty of the defendant? Obviously to secure payment of the legacy from Thompson individually. This could have been enforced by legal proceedings, but if Thompson voluntarily came forward and made a cash payment in settlement, the defendant Society would have been derelict in its duty if it had not accepted such payment.

Even assuming the defendant to have had notice of the embezzlement of the assets of the Saul Estate, the defendant was charged with no notice that Thompson had com-

mitted any further embezzlement or misappropriation of funds when he settled his indebtedness to the Society. It is not to be presumed that because a man embezzles the proceeds of one estate, that therefore, when he makes restitution he is doing so with funds which he has embezzled elsewhere. The presumption is of innocence, not of guilt.

State Bank *vs.* United States, 114 U. S., 401.

Furthermore, the defendant was under no duty, contractual or otherwise, toward the complainant which put it upon inquiry as to the source from whence Thompson derived the funds with which to pay this legacy. The complainant and the defendant are absolute strangers to each other in the transaction.

If any question be raised as to whether the complainant was charged with notice of the defalcations of Thompson as to the assets of the Saul Estate, the answer is twofold: first, that the question is irrelevant and in legal intendment impertinent; second, that upon the facts it is unequivocally to be answered in the negative.

THIRD POINT.

The defendant Missionary Society, having received Thompson's check for value and without notice, is not liable to refund to the complainant any of the proceeds thereof.

The principle and rule upon which we assert this proposition have been steadily adhered to by the Courts even

where fraud much more gross than that of Thompson was the ground upon which relief was sought.

The general rule is stated by Mr. Justice Harlan, in *Railroad Co* vs. *National Bank*, 102 U. S., pp. 14, 25, as follows:

> "According to the very general concurrence of judicial authority in this country, as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statute regulations to the contrary—that where negotiable paper is received in payment of an antecedent debt, or where it is transferred by endorsement as collateral security for a debt created or a purchase made at the time of the transfer * * * in each of these cases the holder who takes the transferred paper before its maturity, and without notice, actual or otherwise, of any defence thereto, is held to have received it in due course of business, and in the sense of the commercial law becomes a holder for value, entitled to enforce payment without regard to any equity or defence which exists between prior parties to such paper."
>
> Followed in McMurray *vs.* Moran, 134 U. S., 150, at 158.

This rule has been applied and adhered to even in a case where the United States was the party benefitted, it having received a check obtained by fraud, but which was received by it without knowledge of the fraud, in part payment of moneys previously criminally abstracted from the Sub-Treasury.

State Bank vs. *U. S.*, 114 U. S., 401, was a proceeding brought in the Court of Claims to recover the proceeds of a check fraudulently obtained from the plaintiff by a third person, and received by the officers of the Sub-Treasury for value and without notice. One Carter, a broker, by collusion with one Hartwell, disbursing clerk of the Sub-

Treasury of the United States at Boston, had abstracted from the Sub-Treasury a large amount of money, which he had used in stock speculations. As the time for the monthly examination of the funds in the Sub-Treasury approached Carter arranged for the deposit in the Sub-Treasury of funds sufficient to make good the amounts abstracted, the disbursing clerk agreeing that these funds so deposited should be returned on the following day. As a part of this deposit of funds, Carter delivered to Hartwell, as clerk of the Sub-Treasury, a cashier's check for $125,000 drawn by the plaintiff Bank to the order of Carter's firm (Mellen, Ward & Co.) This check was obtained by Carter upon fraudulent statements and representations, and then within fifteen or twenty minutes was delivered by him to Hartwell, as part of the funds to be used in making good the deficiency, Hartwell not knowing the circumstances under which it had been obtained by Carter. The draft was subsequently cashed and the proceeds turned into the Sub-Treasury. The proceeding was brought to recover this sum of $125,000 fraudulently obtained from the State Bank by Carter, and which was directly traced into the possession of the United States.

It was held that the State Bank could not recover, the check having been received by the United States for value and without notice of the fraud.

The Court, in its opinion, distinguished the case from a somewhat similar claim made by the same Bank and growing out of the same transaction which had been the subject of a previous adjudication (United States *vs.* State Bank, 96 U. S., 30). In the previous case the Court held that certain gold certificates were received by Hartwell,

with knowledge that they were the property of the State Bank, and not the property of Carter, and, therefore, the United States did not occupy the position of a holder for value and without notice.

With reference to the later action, the Court, per Mr. Justice Harlan, says:

> "There is no room in the present case for the application of that principle. Apart from his responsibility for the crime committed in using the money of the United States, Carter, representing Mellen, Ward & Co., was under a legal obligation to replace the money abstracted from the Sub-Treasury. Of his purpose to do so Hartwell was informed, but he had no reason to believe that Carter would bring him money or securities which belonged to some one else, and which he could not rightfully deliver in discharge of his indebtedness to the Government. When the draft of $125,000 was delivered by Carter to Hartwell the latter was unaware of the means by which the former had obtained it from Smith the cashier of appellant. It was on its face the property of Mellen, Ward & Co. Upon its receipt by Hartwell for the United States, the Government acquired the same rights in reference to it that any private citizen receiving it in the course of business would have acquired."

In the State of New York the application of the rule is even more fully illustrated.

In *Stevens* vs. *Board of Education*, 79 N. Y., 183, one Gill, who was a member of the Board of Education of the City of Brooklyn, had converted to his own use the money of the Board and so became indebted to it for the amount thus abstracted. In order to procure the means of payment, Gill forged a mortgage upon the land of another and sold it to plaintiff, receiving from him the proceeds and depositing them to his own credit. He then drew a

check for the amount of his debt to the Board of Education, and with it paid that debt in full. The Court held that the plaintiff could not recover the money from the Board of Education. The Court said (page 187):

> "But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions, that the payee of money in due course of business shall not be put upon enquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or chose in action may by enquiry in most cases ascertain the right of the person from whom he takes the title; but it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience and to give security and certainty to business transactions, adjudges that the possession of money vests a title in the holder as to the third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good between the parties, it is good as to all the world. 'Money' said Lord Mansfield in *Miller* vs. *Race* (4 Burr, 452), above cited, 'shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business.'"

In *Newhall* vs. *Wyatt*, 139 N. Y., 452, a partner applied the funds of his firm to the payment of his individual debts. The Court held that as this creditor received the money innocently, he could not be compelled to account for the money misappropriated by his debtor. The Court

cites and approves *Stephens* vs. *Board of Education* (*supra*), and says:

> "But I think it is equally well settled that the payment of money to a creditor, who receives it in discharge of an existing debt innocently and without knowledge or means of knowledge that the debtor paying had no rightful ownership of the fund, is good and effectual and does not subject the recipient to a recovery by the true owner."

In *Goshen National Bank* vs. *State*, 141 N. Y., 379, the cashier of the plaintiff was also the Treasurer of Orange County. He drew as plaintiff's cashier a draft upon the plaintiff's New York correspondent for the amount of money which he, as County Treasurer, was indebted to the Comptroller of the State, and forwarded it to the Comptroller. The Comptroller collected the draft and credited the plaintiff's cashier with the proceeds. It was held that the Comptroller, having received the draft in good faith, the bank could not recover the proceeds from the State, and this was held in spite of the fact that the County Treasurer's name was signed to the draft as cashier of the plaintiff. The Court says, at page 385:

> "If the cashier, instead of sending this draft, had taken the money directly from the Bank and paid the same to the State in satisfaction for the amount due for taxes, I think no one would contend that the Bank could recover it back from the State on the ground that the act of the cashier in taking the money was a fraud upon it or even a felony, and that the State had parted with no value at the time of the receipt of the money. I do not see that in this respect the case is altered by the interposition of the draft instead of the payment of the money in the first instance. * * * The interposition of the draft makes no difference in principle after it has been paid. It is then the same

> as if the money had been originally paid instead of an order given for its payment. The order having been complied with and the original debt thereby satisfied, the transaction is closed and may not be reopened on this ground."

In *Hatch* vs. *National Bank*, 147 N. Y., 184, the agent of the plaintiff procured a loan upon stock of the plaintiff which he had fraudulently converted. The agent then deposited that money with the defendant Bank, which under a special agreement with the agent, applied the money to the satisfaction of an antecedent debt due it by plaintiff's agent. The Court held that the plaintiff could not recover the proceeds of the stock so converted. The Court said at pages 191, 192:

> "This doctrine goes upon the broad ground that money has no earmark, that in general it cannot be identified as chattels may be, and that to permit in every case of payment of a debt an enquiry as to the source from which the debtor derived the money and a recovery if shown to have been dishonestly acquired, would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy as well as upon that principle of justice which determines, as between innocent parties, upon whom the loss should fall under the existing circumstances."
>
> Citing Stevens *vs.* Board of Education, 79 N. Y., 183.

In *Dike* vs. *Drexel*, 11 App. Div., 77 (affirmed upon the opinion below, 155 N. Y., 637), a member of a firm paid over the firm's check to persons who had no claim against the firm. The defendants applied the proceeds of the check on a note held by them and made by the member of the firm; and did not surrender the note,

as it was not fully paid, but merely endorsed upon it a credit for the amount received. It was held that the plaintiff, who was the Receiver of the firm, could not recover the proceeds of the check thus misappropriated. The Court held that the only point put in controversy was whether the defendants who received the check "had knowledge or means of knowledge that it is the property of another than the one paying" (p. 83), and that "the question therefore upon which the decision of this case turns is, whether the form of the checks constituted notice that the funds of the partnership of Field, Lindley, Wiechers & Co. were being used by Field to pay the individual debts of himself and Lindley" (p. 84). After an examination of all the facts, the Court held that there was not sufficient evidence of notice, and that the defendants had innocently received the proceeds of the check for value, and were not liable to return it.

Nassau Bk. vs. *Nat. Bk. of Newburgh*, 159 N. Y., 456.

G. B. Taylor deposited to his account in the Nassau Bank a forged draft for $6,000 on the Chase National Bank. Later the Chase Bank discovered that the draft was forged, and the $6,000 was returned to them by the Nassau Bank.

Meantime Taylor had withdrawn nearly the whole of the $6,000 from the Nassau Bank, $2,400 of it being used to reimburse the National Bank of Newburgh for money which he had stolen from them by forged checks, but of the loss of which they were unaware.

The rather curious circumstance was presented of Taylor

repaying to the Bank of Newburgh moneys which he had misappropriated, but both the embezzlement and the restitution being without the knowledge of that bank. It was held that there was adequate consideration and that the Bank of Newburgh was entitled to retain the moneys.

The Court in its opinion said:

> "It is argued that the mere deposit by Taylor of the money, without the knowledge of, or the acceptance by, his creditor, could not constitute payment within the rule. I am unable to recognize the force of the contention. Taylor was a debtor by reason of his forgeries, as well to those who were injured in their property rights thereby, as to the law for his criminal act, and it is of no conceivable importance, in my opinion, that the existence of the fact of indebtedness should be unknown, at the time when he sought to make reparation by repaying the moneys feloniously taken * * * I think Mr. Justice Cullen, who delivered the opinion at the Appellate Division, admirably expressed it, when he said: 'Where one person defrauds another so skillfully that the party defrauded is ignorant of his loss, and restitution is made so adroitly that it does not disclose the original offense, does any different rule obtain from a case where one confesses his fault and openly makes restitution? We apprehend that there can be no distinction between the two cases, and that the very statement of the question precludes the possibility of but one answer.'"

The same doctrine is established in the State of Pennsylvania.

In *Stedman* vs. *Carstairs*, 97 Pa. St., 234, the defendant was the holder of a worthless check of one Heilbroner, and surrendered it to him, taking in payment the check of the plaintiff, which Heilbroner had obtained from the plaintiff by fraud. It was held that the plaintiff could not

recover the amount of his check from the defendant, who had no knowledge of the fraud.

In opposition to this array of authorities the learned counsel for the appellant cites the following:

Wilson *vs.* Smith, 3 How., 763.

People's Savings Bank *vs.* Bates, 120 U. S., 556.

Decan *vs.* Shipper, 35 Penna , 239.

Swift *vs.* Williams, 68 Md., 236.

Of these *Wilson* vs. *Smith* was relied on by the learned Justice at the Circuit Court and is hereinafter discussed.

People's Savings Bank vs. *Bates* is wholly inapplicable, the question not being as to the transfer of negotiable paper nor money, but the giving of a chattel mortgage.

Decan vs. *Shipper* was a case of a bill of lading void in its inception by reason of fraud, and is inapplicable.

Swift vs. *Williams* requires more comment. The facts in that case are complicated, and are not recited except in the opinion of the Court. It may readily be seen that the influencing consideration may perhaps be found in facts not specifically set forth.

But even on the facts stated in the opinion, the case can be distinguished from the case at bar. It appears at p. 247 that the check to the creditor was signed by two persons as trustees, whereas the debt was due to him from a trust fund held by a single trustee. He therefore had notice that he was being paid from the wrong fund.

So far as the decision sustains (if at all) the proposition that a creditor, receiving a check in payment of a *bona fide* antecedent debt, and without notice of a breach of trust upon the part of the debtor, may be made to refund such payment, this Maryland case stands absolutely alone

and in opposition to the unanimous decisions of the courts of every other jurisdiction, so far as we have been able to ascertain through a careful investigation. The briefs there submitted to the Court do not call attention to the numerous adjudications holding the contrary view, and this decision has never been followed, nor been even cited, in any other jurisdiction, nor do we find that it has been made the basis of any subsequent adjudication even in that Court.

As a learned writer upon the law has aptly said, "Hard cases make bad law," and perhaps the explanation of this anomaly in the current of judicial decisions may be traced to this source.

The Cases Cited by the Circuit Court.

The learned Justice, presiding at the Circuit Court, in his opinion cited only two cases as authority for his decision. These were *Wilson* vs. *Smith*, 3 Howard, 763, and *National Bank* vs. *Insurance Co.*, 104 U. S., 54. Both cases can be readily distinguished from the one at bar. In one case the person receiving and retaining the moneys was not a holder for value; in the other case he was expressly found to have notice of the equities af the plaintiff.

Wilson vs. *Smith*, 3 How., 763:

The plaintiffs were the owners of a draft or bill of exchange drawn by one Holcombe, of Augusta, upon one Mills of Savannah. This draft the plaintiffs placed in the hands of their agent, St. John, at Augusta, Ga., for collection, and it was by him forwarded to the defendant, who was the agent of St. John at Savannah, Ga., for acceptance and collection. The defendant collected the

draft, but, St. John having failed in business and being indebted to the defendant, the defendant applied the money upon this indebtedness. The plaintiff then brought an action to recover the amount of the draft from the defendant. A question arose as to whether there was sufficient privity of relationship between the plaintiff and defendant to enable the plaintiff to bring such an action, and a division of opinion having arisen, the question was certified to the Supreme Court. Upon this question the Court decided in the affirmative. Upon the argument, the further question arose as to whether the defendant had the right fo retain the moneys in question on account of the money due to him from St. John.

From the statement of facts it is not clear whether or not the defendant knew that St. John, in forwarding to him the draft in question, was acting as agent or in his own right. It is stated, however,

> "that the draft or bill of exchange was made payable to the order of Henry B. Holcombe, the drawer, and by him endorsed in blank, and endorsed by St. John to H. Smith, Esq. (the defendant) or order. That when the draft was sent to the defendant for collection he was not apprised to whom it belonged, nor were any instructions or directions given to him as to the disposition of the money when collected."

The Court held that the defendant was not entitled to retain the money, upon the ground that no new advances were made by him and no new credit given to St. John on account of this bill. The Court says (p. 770):

> "Now, if St. John had owed him nothing, upon the principles we have already stated the plaintiff would be entitled to recover the money, and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case

shows that he incurred no new responsibility upon the face of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him."

This question was not regularly before the Court, and its opinion upon this point was a dictum. Even if authority, it is not applicable to the case at bar, because the facts are radically different. The Missionary Society was not the agent of Thompson, and did not receive his check for the purpose of collecting it for his account, but received it in actual payment of an existing debt. Furthermore, the doctrine of this case is not wholly consistent with that of *Swift* vs. *Tyson*, 16 Pet., 1, which is the leading case upon the subject, and has been consistently followed by the Federal Courts.

National Bank vs. *Insurance Co.*, 104 U. S., 54:

The appellant National Bank had its office in the City of Baltimore, and among its depositors was one A. H. Dillon, Jr., who was General Agent for the Connecticut Mutual Life Insurance Company of Hartford, having his office across the street from the Bank. Dillon's account with the Bank was designated on its books as follows:

"*Dr.* Central National Bank in Account with A. H. Dillon, Jr., General Agent. *Cr.*"

This account was opened April 1st, 1871. Previous to opening it Dillon opened another account in the name of his wife, and subsequently an account in his individual name. In the following year, Dillon obtained from the Bank a personal loan, which was renewed from time to

time, the last renewal being in December, 1873, at which time a note for $10,000 was given, dated November 29th, 1873, payable six months from date, and signed by both Dillon and his wife individually. This note not being paid on maturity, the bank charged it against the account of A. H. Dillon, General Agent. Dillon was ignorant of the fact, and continued to make deposits and drafts to his account as agent of the Insurance Company until the account was closed June 12th, 1874.

The action was brought by the Insurance Company to recover moneys which Dillon had collected as its agent and deposited with the Bank in the agent's account above referred to.

Judgment was rendered in favor of the Insurance Company, and, upon appeal, this was affirmed. The Court, per Mr. Justice Matthews, said (p. 62):

> "It is claimed further, in support of the Bank's position, that the discount of the note, afterwards charged to this account, was made originally upon the faith and credit that the latter was Dillon's individual property. But this we find to be distinctly and fully negatived by the circumstances in proof. * * * We find it also to be fully proven that the Bank knew that Dillon was the agent for the Insurance Company; that it was his business and duty to collect and remit to it the premiums on policies of life insurance as they accrued; that the bank account with him as General Agent was opened in that way, to be used for that purpose; that in point of fact such premiums were collected and deposited for accumulation to be remitted, and were remitted, by checks on that account, and that they constituted much the larger part of the fund which they entered into.
>
> "It will be observed that the question arising here is *not* what the rights of the parties would be if the note had been taken up by Dillon's check upon that

account, the Bank having no knowledge of its character except from what might be inferred from the use of the words 'General Agent' at its head. Here the attempt is made, *with the actual knowledge which we find imputable to the Bank*, and without Dillon's assent, to pay itself the overdue note out of the funds for which, as agent for the Insurance Company, he was bound to account to it."

FOURTH POINT.

The defendant Missionary Society, having received the proceeds of Thompson's check without notice of the source from which they came, had actually expended these proceeds in pursuance of the directions of Doctor Saul's will before receiving notice of the Complainant's claim.

If the defendant Society received Thompson's check for value and without notice, as shown in the Second Point of this brief, it is immaterial whether the proceeds had been disposed of, so far as the complainant's claim is concerned. It might stop there and its defense would be complete.

As matter of fact, however, the transactions of the Society stand on a different footing from those of an individual or of a business corporation. The Society received no personal advantage from the receipt of these moneys from Thompson.

The legacy from Doctor Saul directed the moneys to be paid to the Society to be expended for certain specified missionary purposes. The Society applied them to these purposes as soon as received. It took the moneys in a quasi-trust capacity and expended them before notice of

the complainant's claim. The complainant now asks that the Society be compelled from its other funds to reimburse him for the moneys so received and expended.

The Society's income is derived chiefly from voluntary contributions, legacies, and offerings of churches and Sunday schools. If the complainant's claim be sustained, he must be paid from moneys received from such sources as these. The moneys received from the Saul legacy are gone beyond recall.

Thompson delivered the check to the defendants on June 19th. They deposited the check on the next day, and did not receive Holly's notice alleging that they had been paid money belonging to him until July 18th, 1890, the notice having been mailed on the 17th, as appears from the testimony of Holly's attorney (p. 96).

On the 20th day of June their balance at the bank was $43,569.83, as appears by the bank account (p. 116). From that time until July 18th, the day on which they received the notice, the checks drawn out amounted to $88,589.74 (pp. 116–122), being far more than the aggregate of Thompson's check and the balance on hand on the day that it was received. As the money has no ear-mark the only way to trace any particular amount in a general account of this character is to apply the first item on the credit side to the first item on the debit. It is thus evident that Thompson's check for $15,577.54 was paid out many days before Holly's notice was given to the Society. These checks were all drawn out to meet disbursements authorized and approved by the Society long before. (Testimony Dr. Kimber, p. 143, *et seq.*, and 146, *et seq.*)

The fundamental rule of legal accounting requires that the first debit should be charged against the first credit. (U. S. *vs.* Kirkpatrick, 9 Wheaton, 720; Thompson *vs.* St. Nicholas Bank, 113 N. Y., 325, 333; Morse on Banks and Banking (2nd ed., 32). Consequently we must exhaust the balance on hand at the time of Thompson's checks before taking up any latter deposit:

Balance on hand June 20/90	$43,569.83
Amount deposited June 20/90, including Thompson's check	16,540.26
Total	$60,110.09
Checks drawn out from June 20/90 to July 18/90, inclusive	$88,589.74
Excess of expenditure over balance and deposit	$28,479.65

The defendant made no effort to conceal any fact relative to the cause, and at considerable labor had prepared statements showing all of the checks drawn by the Society during the period from June 1st, 1890, to August 1st, 1890, and subdividing them so as to show which of them went into the account of Domestic, Foreign and Colored Missions and general office expense accounts, respectively. These statements show the date of each check, the name of the person to whom drawn and the amount, and the account to which it is chargeable (p. 147). Pursuant to stipulation, these documents are not printed in full, but may be produced upon the hearing of the cause (p. 147).

The learned Judge in the Circuit Court referred to this proof in the following language (p. 183):

> "Some suggestion is made that this was received as a charitable bequest and so applied, that it is gone

beyond reach and cannot be recovered, but defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul or otherwise than as it would use its general funds in furtherance of its objects, nor that any of this particular money was applied to any of its purposes."

By his will Dr. Saul bequeathed his property to the defendant Missionary Society, to be "appropriated in equal proportions, one-third to Domestic Missions, one-third to Foreign Missions, one-third to the benefit of the colored people in the Southern or formerly slave States, for the support of schools and missions" (p. 54).

Mr. Roberts testified (p. 223) that upon the very memorandum which accompanied the check received from Thompson, there was written by him: "Legacies, Pa. Phila., Estate of Rev. James Saul, D.D., 1/3 Domestic equals $5,192.52; 1/3 Foreign equals $5,192.51; 1/3 colored equals $5,192.51."

The receipt of this money is similarly acknowledged in the Treasurer's Report as being applicable and actually applied to the three classes of missions specified (p. 159).

It appears by the testimony of Dr. Kimber (pp. 144, 145) that the various missions are supported by moneys paid out by the Society under appropriations made from time to time by the Board of Missions. For the year ending September 1, 1890, appropriations were made according to a specified schedule (p. 168) and similarly for Foreign Missions and Colored Missions (p. 170).

These schedules provided

For domestic missions	(p. 169)	$174,355.00
" foreign "	(p. 170)	151,553.23
" colored "	(p. 170)	40,000.00

Dr. Kimber testified (p. 149):

> "These resolutions having been passed, then, as I understand it, the practice of the executive officers of the Board of Missions is to go on with the prosecution of the work outlined by these appropriations? A. Yes, sir, certainly."

On June 10, 1890, a resolution was passed by the Board of Missions in the following terms (pp. 145, 170):

> "RESOLVED, that the Treasurer be instructed to apply so much of the gross amount received from Domestic and Foreign and general legacies to Sept. 1, 1890, as may be required toward the appropriations for corresponding work to the same date."

It was under the authority of this resolution that all payments were made by the defendant Society between June 10, 1890, and September 1, 1890. The payments so made between June 19th and July 18th, 1890, aggregated more than the aggregate of Thompson's check and the balance on hand when it was received.

These payments were subdivided and stated in full in separate lists under the respective headings of Domestic Missions, Foreign Missions, Colored Missions and General Expenses (p. 146).

The money received by the Society from Thompson was immediately deposited by the Society and drawn against and used in the payment of these appropriations, as appears by Defendant's Exhibits A, B, C, D and E, put in evidence at page 147.

This use was in exact compliance with the conditions upon which it was bequeathed.

FIFTH POINT.

The bill was properly dismissed and the judgment should be affirmed.

Dated New York, December 1st, 1900.

JULIEN T. DAVIES,
HERBERT BARRY,
Of Counsel for Respondent.